

Before going to work for respondent, claimant was employed by Learjet when she began to suffer pains in her neck, upper and lower back, both shoulders, both arms and legs. The problems continued over the course of the next year and in January 1999, claimant was taken off work. She was treated by Dr. Pedro A. Murati and ultimately assigned a 15 percent whole body impairment as a result of the problems in her neck and upper extremities.

Claimant resolved her claim with Learjet for a lump-sum payment in excess of \$40,000. In accepting this settlement, claimant closed her right to further medical treatment although the medical records indicate she continued to have problems with her neck as late as November 1999. Claimant testified she continued to have neck and shoulder problems on at least an occasional basis after leaving her job with Learjet.

In August 2000, claimant began working for respondent in the kit cut department through a temporary employment service. This job required her to cut sheet materials with a machine and by hand. On November 7, 2000, claimant successfully applied for employment with respondent.

She was originally assigned to the kit cut department where she would cut material using both machines and a utility knife. While working in this department she testified she began experiencing pain in her left shoulder, beginning around October and November 2002. She describes the pain as “[s]harp, aching, burning” in her left shoulder.¹ When asked how this pain is different from that she experienced while working at Learjet, she indicates the pain is now more in her bone rather than the muscular pain she had previously. Claimant also testified she reported this problem to her lead man although the date she provided notice is not disclosed within the record.

The medical records show that claimant was treating with her personal physician, Dr. Stephen J. Schneider, complaining of neck pain in June 2002 and continuing into November 2002 when she was referred to Dr. Estivo.

In December 2002 claimant was seen by Dr. Estivo, apparently through her private insurance carrier. She reported a 4-year history of cervical spine pain with numbness with the left arm. Following an examination, he diagnosed cervicalgia with radiculopathy, degenerative disk disease at the C5-6 level with left sided disc bulging and left shoulder pain. He ultimately suggested she have arthroscopic surgery to her left shoulder to determine the precise source of her impingement syndrome.

In January 2003, claimant requested a transfer to the trim shop. This job involved the use of mechanical tools, including a router and a sander. Claimant alleges that she favored her left shoulder and over-utilized her right upper extremity which gave rise to

¹ P.H. Trans. at 9.

complaints in her right elbow. Again, she says she notified her supervisor of this development.

Claimant continued treating with Dr. Estivo. His records indicate claimant did not relate her complaints to her job although in February 2003, he does note that she was experiencing difficulty tolerating her work activities due to pain. Surgery was still a suggestion but ultimately her private carrier refused to pay for the procedure as it was deemed medically unnecessary.

In April 2003, claimant notified respondent of an injury to her left shoulder and right arm. Claimant was referred to an occupational facility and her left shoulder and right arm complaints were evaluated by Dr. Mark S. Dobyns. Her work was restricted for a period of time and then on May 16, 2003, she was referred to Dr. Estivo, the physician who had been treating her. There is no medical evidence in the file to indicate whether claimant saw Dr. Estivo and if so, what were his recommendations and opinions.

In June 2003, claimant filed this claim alleging two specific dates of onset followed by a series of injuries. The primary focus of her complaints are her left shoulder and right arm, specifically the elbow.

CONCLUSIONS OF LAW

The Board has jurisdiction to review a preliminary hearing finding of whether a claimant has sustained an accidental injury arising out of and in the course of employment and whether notice was given, both of which are jurisdictional issues specifically cited in the Workers Compensation Act.²

After reviewing the medical records and the claimant's uncontroverted testimony, the Board is persuaded that claimant sustained an accidental injury arising out of and in the course of her employment with respondent. It is clear that claimant has a pre-existing medical condition that involved, at a minimum, her neck, upper and lower back, both legs, shoulders and arms. Those complaints were apparently related to her employment with Learjet and were settled on the basis of a full and complete compromise, foreclosing any right she may have had to seek additional medical treatment for those injuries.

She has been employed by respondent since January 2000 performing what is undoubtedly repetitive work with her upper extremities. According to claimant, the pain she presently has in her left shoulder is different. She describes it as more in the bone while her earlier problems were muscular in nature. The right arm complaints have been focused in her elbow, an area that was not involved in her prior claim and only became a problem, according to claimant, when she overcompensated for her left shoulder complaints. There

² K.S.A. 44-534a.

is no medical testimony within the record that indicates that claimant's present complaints are the natural and probable consequence of the claimant's pre-existing condition(s). While it is true that she continued to voice complaints about her physical condition to her personal physician beginning in the summer of 2002 and continuing into 2003, before she gave notice to respondent, the ALJ was persuaded that her work activities at least aggravated her pre-existing condition. The Board finds no reason to disturb that finding based upon the evidence presented at the preliminary hearing.

As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim.³

As for respondent's challenge to timely notice pursuant to K.S.A. 44-520, the ALJ apparently concluded that notice was given although the Order does not disclose any such explicit finding. Nonetheless, the uncontroverted evidence is that claimant provided written notice to respondent on April 23, 2003, claiming a series of repetitive injuries commencing on December 16, 2002, and continuing up to and after April 23, 2003. This document discloses an injury to her left shoulder and right arm. The notice requirement was met.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that Administrative Law Judge Nelsonna Potts Barnes' August 6, 2003 preliminary hearing order is affirmed.

IT IS SO ORDERED.

Dated this _____ day of September 2003.

BOARD MEMBER

c: Thomas M. Warner II, Attorney for Claimant
William L. Townsley, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

³ K.S.A. 44-534a(a)(2).